IN THE EMPLOYMENT COURT
AUCKLAND

AC 18/07
ARC 17/06

IN THE MATTER OF	of a challenge to determination of Employment Relations Authority
AND IN THE MATTER OF	an application to strike out proceedings
BETWEEN	OWEN KINGI Plaintiff
AND	RESPONSIVE MAINTENANCE 2000 LIMITED Defendant

Hearing: 19 April 2007
(Heard at Auckland)

Appearances: Owen Kingi, In person
Monique Rush, Counsel for Defendant

Judgment: 19 April 2007

ORAL INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

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[1] This is an application by the defendant, Responsive Maintenance 2000 Ltd, for an order striking out the proceedings of the plaintiff, Mr Owen Kingi. The proceedings themselves consist of a challenge to a determination of the Employment Relations Authority at Auckland on 10 February 2006.

[2] The proceedings originally arose from an incident, which took place at the premises of Placemakers of which the defendant was a regular customer and Mr Kingi was an employee of that customer, the defendant. I am not going to go into the circumstances surrounding the matter giving rise to the grievance, except that Mr Kingi had his employment terminated.

[3] The determination of the Employment Relations Authority was that he was unjustifiably dismissed, but because of his own conduct in the matter he should not have any remedies.

[4] As I say he then challenged that decision and it reached the point where it was set down for a hearing in the Morrinsville District Court being constituted as the Employment Court. At the last minute that hearing was not able to proceed because of a family bereavement suffered by Mr Kingi and the matter was adjourned. Rather than being adjourned to a further date in the Employment Court there was a suggestion that the parties may be able to mediate their differences by using the facilities of a Marae to which Mr Kingi and also personnel involved in the defendant company are connected. Unfortunately nothing happened after that date and accordingly the defendant, being frustrated in attempts to have the matter finally resolved, has made the present application to strike out Mr Kingi's claim.

[5] The application first came before me on 27 March 2007. Ms Rush who today appears for the defendant appeared on that date. It was hoped and expected that Mr Kingi would be represented by his advocate who had represented him to that point, Mr John Peebles. Mr Kingi appeared on 27 March in person and it was clear to me that he was having difficulties in instructing his advocate and having his advocate represent him. On the basis of those difficulties disclosed to me I refused to deal with the application to strike out on that day and instead adjourned it until today's date. I indicated then to Ms Rush that if the defendant was to rely upon prejudice, at that point it had been insufficiently itemised in the affidavits in support of the application and that the delay would therefore give her the opportunity to file updated affidavits dealing with that aspect. Such an affidavit has been filed with the Court prior to today's hearing from Mr Tau, which sets out allegations of prejudice suffered by the defendant as a result of the delay.

[6] I interpolate here to note that prior to the hearing on 27 March last, but unbeknown to me, correspondence had taken place between Mr Peebles and the Registrar of the Court in which Mr Peebles had indicated that he was no longer representing Mr Kingi. That correspondence has been given to me this morning. In any event it was plain to me on 27 March 2007, that the difficulties between Mr

Kingi and his advocate, Mr Peebles, were such that it would be unlikely that Mr Peebles would be representing him further and I recommended to Mr Kingi that prior to today's date he should endeavour to obtain alternative representation. He advises me this morning that he has endeavoured to do that but has been unable to do so.

[7] Turning now to the application to strike out, the principles with such an application are well established. The applicant for the strike out must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, that there has been serious prejudice to the defendant applicant as a result of the delay, and that even though those factors may be established, ultimately the Court must have regard to the interests of justice in determining whether proceedings should be struck out. Those factors are not exhaustive but tend to be adopted by the Court in applications such as this.

[8] Insofar delay is concerned, I have already set out some of the circumstances surrounding that. The hearing was set down. The defendant was ready to proceed in Morrinsville. It was no fault of the defendant that the matter could not proceed but from humane aspects the Court adjourned the proceedings then because of the bereavement suffered by Mr Kingi and his family. It was then indicated to the Court that the parties would endeavour to resolve the matter. Apparently the defendant has been ready and willing to deal with this matter by way of Mediation, whatever form that might take, and that it is now frustrated by the delay. It is submitted on behalf of the defendant that the delay is inexcusable. While the initial adjournment was beyond the respondent's control, there has been no excuse offered for the delay since then. The respondent has not had counsel or advocate appointed, has made no effort to do that, and has given no explanation, either himself or through his advocate or representative as to the reasons for the delay or inability to commit to a new date.

[9] Insofar as prejudice is concerned the affidavit of Mr Tau does set out matters of prejudice suffered by the defendant. Some of them are in the traditional form of an allegation that witnesses who were available to give evidence at the trial may no longer be available. Some of them are no longer employed by the defendant, their memories will be dimmed by the delay, they are now, some of them, in places away from where the hearing will take place, they will need to be resummoned and will

have to travel distances to attend the hearing and that some of them may be unwilling or unable to give evidence. It is also alleged that any attempt to mediate on the Marae may cause prejudice. In addition to that the defendant is a major customer of Placemakers where the original incident took place; that there is embarrassment on the part of the defendant as to the incident, which led to Mr Kingi's dismissal; that that may have the effect of souring or continue to sour relationships between a customer and its supplier of products; that rehearing the matter at this stage where people from Placemakers may give evidence will exacerbate that embarrassment and possibly cause further deterioration in the relationship, but in any event will revive the entire matter in the mind of Placemakers, which is not to the advantage of the defendant.

[10] Insofar as the interests of justice are concerned, Ms Rush for the defendant has submitted that it is unreasonable and unfair to the defendant applicant that this matter be prolonged without good cause and that in the overall interests of justice the time has now come where the proceedings should be dismissed.

[11] Mr Kingi who has spoken on his own behalf this morning, denies that there has been any prejudice. He says that he agreed to meet on the Marae but the employer wanted him to sign a document and relinquish the claim before the meeting would take place. That is denied by Ms Rush on behalf of the defendant. Mr Kingi goes on to say however, that having been willing to meet on the Marae he has since been waiting for the Court to allocate a date and nothing has transpired. Of course he has taken no steps himself to advance the matter, but he does say, and it is important, that he should be given the opportunity to air his side of the story at a properly constituted hearing of the Employment Court.

[12] Ms Rush in reply to those submissions indicated that she is not aware of the demands that Mr Kingi refers to but does indicate that even now the defendant, if the proceedings are not to be struck out and he still pursues the application, would be prepared to attend Mediation, hopefully with the effect of resolving this matter finally.

[13] Obviously attempts have been made by the Court in this matter to have a hearing away from Auckland to suit the places of residence of the parties. Since the Morrinsville hearing, obviously the defendant has remained at its premises in Hamilton but Mr Kingi has apparently moved from the Waikato and now resides in Northland. If this matter were to proceed to a hearing in the Employment Court it seems to me better that the Employment Court should simply set the proceedings down in Auckland, rather than endeavouring to establish a place of hearing away from Auckland and that way the proceedings could be better controlled.

[14] But in any event, I now return to the application to strike out. I have specified the principles to be adopted and the respective parties' submissions in respect of the factual matters as they relate to those principles.

[15] An important consideration is that the Court should not strike out proceedings lightly because that would then deprive a party, who is wanting to proceed, from having their day in Court, from "airing" the matter, as Mr Kingi puts it, by giving his side of the story and having the matter adjudicated upon. Mr Kingi has rights of challenge to the determination of the Employment Relations Authority and he has pursued that matter within the timeframes, which are set under the Employment Relations Act 2000. A matter that causes me concern in this particular application and probably is an element of the overall justice, is the clear difficulty that Mr Kingi has experienced between himself and his advocate Mr Peebles. I understand that Mr Peebles has a difficult family matter to deal with at the moment and is unable to appear in Court for Mr Kingi. As I have indicated he has indicated to the Court in correspondence or communications that he is no longer able to represent Mr Kingi.

[16] Insofar as the allegations of the defendant in support of the application are concerned, it is clear that there has been a delay, which is unfortunate and unacceptable, but I am not prepared to accept the argument that that has been an inordinate delay. In my earlier minute following the hearing on 27 March 2007 I made mention of the fact that under the Employment Relations Act 2000, from the time of a submission or referral of a grievance a grievant has 3 years in which to commence proceedings. Mr Kingi in this case commenced his proceedings within a very short time of submitting the grievance but the fact of the matter is that having

submitted the grievance, the 3 year period which he would have had to have commenced these proceedings is still running and will not expire until November 2007. That is a material matter to be taken into account, not only in regard to whether the delay is inordinate but also the overall justice of the matter.

[17] Insofar as inexcusable delay is concerned the applicant defendant submits that the delay is inexcusable but I am again not prepared to necessarily accept that, because Mr Kingi is a layman. It is clear that he has been let down somewhat, maybe not the fault of the advocate but by the circumstances which have arisen and have resulted in him not necessarily being adequately represented in these proceedings at the moment.

[18] Insofar as prejudice is concerned it is clear that the defendant has suffered prejudice. There is always prejudice suffered by delay. There will always be an argument that such delay will result in the dimming of memory of witnesses. The witnesses may not be available and of course that would have been the same circumstance, which would have arisen today, if Mr Kingi, for instance, had not commenced his proceedings immediately, but had chosen to wait until near the end of the 3 year period before commencing the proceedings. He would still have been entitled to do that, and the defendant would have been in exactly the same position, insofar as availability of witnesses and dimming of memories and so on is concerned.

[19] I might add that Mr Tau's affidavit, while raising those matters, is somewhat speculative as to whether witnesses will in fact be available or as to whether memories have in fact been dimmed. There is no evidence of a specific nature dealing with those matters. It is true that the relationship between the defendant, Placemakers and possibly other people that it has contracts with, is affected to its prejudice by the delay, which has been occasioned. Insofar as the overall interests of justice in this matter are concerned I have an uneasy feeling in this matter. Mr Kingi, as a result of difficulties, which he has experienced with his advocate, and as a result of the bereavement, which was not his fault and which led to the first hearing being adjourned and despite being a layman and not understanding that he must be proactive about trying to get a fixture from the Court, has nevertheless tipped the

balance of overall justice in his favour. Having said that however, his own inaction in this matter has really not been acceptable and he will need to understand that from now on he must be far more proactive and co-operative in getting this matter resolved. Having said that it will be clear that for the reasons, which I have expressed, I intend to dismiss the application for strike out. I am not satisfied at this point that the defendant applicant for the strike out has persuaded me that the circumstances are such that I would be entitled, applying the principles which have been referred to, to deprive the defendant of having his day in Court by striking out his proceedings. I might add, however, that the matter has been finely balanced in my mind, and that Mr Kingi needs to understand that this is his last opportunity to get this matter resolved because a further application, which arises from any further delay on his part, will surely lead to the proceedings being struck out at that point.

[20] My intention if I declined the application as I have indicated, was to set this matter down for a trial in the Auckland Employment Court. In my view the matter must now be heard in Auckland. The Court will then have greater control over the matter. It is slightly unfortunate because it means the defendant will need to bring witnesses to Auckland, rather than Hamilton. On the other hand Mr Kingi would need to travel to Auckland from Whangaroa Harbour where he lives, so there is a detriment to both parties. However, Auckland is half way between. The reason that I am saying that the hearing should now be in Auckland is that we are far more likely to be able to get premises and facilities available for an earlier hearing. So the matter will be set down. The Registrar is to allocate a date of hearing forthwith, and there will be no adjournments of that hearing. Once it is set down Mr Kingi needs to understand that he will need to comply with having the evidence if there is any further evidence needed, produced to the Court and that he will need to attend the hearing, whether he is able to get representation or not. As I understand there is no need for any timetabling at this stage, because of course everything would have been prepared for the Morrinsville hearing, which was adjourned at the last moment. If there is any further evidence that is to be adduced then briefs from either side will need to be prepared and filed with the Court within the next 14 days, even if they are to be updating briefs.

[21] Now having made that direction, I have noted with considerable interest, Ms Rush's indication to the Court, that even at this stage if the proceedings were not to be struck out the defendant stands willing and able to endeavour to resolve the matter. Accordingly the matter is referred to mediation, which is to take place before the date allocated for trial. That is to be conducted by the official Mediation Service. There is not to be any consideration of any mediation on a Marae or other informal basis for mediation. This is to be official and conducted by one of the Mediators appointed under the Employment Relations Act 2000. As I say that can take place before any trial takes place. Mediation can be arranged quite easily and urgently and can take place before the hearing itself. If it is settled at mediation then obviously the trial dates can be vacated.

[22] Insofar as costs on this application are concerned that is a matter, which can be the subject of mediation as well. I will reserve the questions of costs on this application, but I have given an indication that it was finely balanced and that would seem to me to give an indication to the parties as to my views on the merits of any costs on the present application. If it cannot be resolved in mediation then the costs on this application can then be determined by the Court when it deals with the overall merits of the matter at its conclusion.

M E Perkins
Judge

Oral interlocutory judgment delivered at 11.30am on Thursday, 19 April 2007